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APPEAL FROM ORIGINAL CIVIL.

30 C. 397=7 C. W. N. 545.

illegally, for it is upon that ground, and upon that ground alone, that the application is based.

A somewhat halting reference was made as to its having acted, in the exercise of its jurisdiction, with material irregularity, but this was not pressed. It has not been seriously contended that the Small Cause Court had not jurisdiction to set aside the award in question under section 521 of the Code, if the applicant brought his case within that section.

That section does not deal with the question of jurisdiction, but specifies the grounds upon which an award may be set aside.

The most that can be said here—and it is said—is that the Small Cause Court took an erroneous view of what amounted to misconduct, and, therefore, that this Court could interfere under section 622. I dissent from this proposition. If the Small Cause Court did take such erroneous view, it only means that it formed a wrong conclusion upon the evidence, or, at the highest, has fallen into an error of law.

But in neither of these views, taking them to be substantiated could it be said that the Court acted in the exercise of its jurisiction illegally (see *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). I respectfully dissent from the learned Judge in the Court below when he says that misconduct under section 521 of the Code means conduct coupled with corruption. Corruption necessarily implies misconduct; but misconduct does not of necessity imply corruption.

An award may often be set aside on the ground of misconduct, which does not amount to corruption. The section says "corruption" *or* "misconduct." The Small Cause Court had jurisdiction to entertain the application, and we cannot interfere **[401]** under section 622 because the Court has taken, if it has taken, in the exercise of that jurisdiction a mistaken view as to what does or does not constitute misconduct.

The appeal must be allowed with costs both here and in the Court below.

HILL, J. I concur.

STEVENS, J. I concur.

Appeal allowed.

Attorney for the appellant: *K. N. Gangooly.*

Attorney for the respondents: *S. C. Mitter.*

30 C. 402(=7 C. W. N. 74.)

[402] CRIMINAL REVISION.

BISHWANATH DAS *v.* KESHAB GANDHABANIK.*

[10th June, 1902.]

Defamation—Charge—Publication—Malice, omission to apologise no proof of—Penal Code (Act XLV of 1860) ss. 499 and 500—Criminal Procedure Code (Act V of 1898) s. 222.

Where an accused person was convicted of defamation under s. 500 of the Penal Code, upon a charge which set out that the defamation was committed on or about the 14th day of April, and afterwards, by describing the complainant as a *Brithiai Bania*.

* Criminal Revision No. 221 of 1901, against the order passed by G. C. Nag, Esq., Subdivisional Officer of Goalparah, dated the 31st of December 1901.

(1) (1884) I. L. R. 11 Cal. 6.

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30 C. 402=7 C. W. N. 74.

Held, that the charge was not a proper charge, inasmuch as it did not set forth the particular occasions on which the defamation was said to have been committed, so as to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him.

Where the accused who was the collecting *panchait* of his village, was alleged to have defamed the complainant, by giving a *chaukidari* receipt to him, in which he was described by the designation of *Brithial Bania*.

Held, that the delivery of such a receipt was not a publication such as would render the accused liable to punishment for defamation, nor could the omission of the accused to apologise to the complainant subsequently, for the use of the caste designation, be taken as indicating that he used it at the time with a malicious intention.

[Ref. P. R. 1910, Cr.=6 P. W. R. 1910, Cr.]

RULE granted to the petitioner Biswanath Das.

This was a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioner under s. 500 of the Penal Code should not be set aside on the ground that the acts of the petitioner did not amount to the offence of defamation.

The petitioner was the collecting *panchait* of his village. It was alleged that he defamed the complainant, Keshab Gandhabanik, by giving a *chaukidari* receipt to him on the 12th April 1901, in which he was described as a *Brithial Bania*. The complainant, **[403]** who was a goldsmith by profession, claimed to belong to a much superior caste called *Gandha Bania*. At the census, in accordance with official orders, a number of persons, amongst whom the complainant was included, were described in the census papers as *Brithial Banias*; but subsequently on a remonstrance by some of them, including the complainant, the caste designation was altered to *Gandha Bania*, but there was nothing to show that the petitioner had any information of the alteration.

The petitioner, it was also alleged, sent a letter to the *panchait* of a neighbouring village desiring him to co-operate with him in putting an end to the pretension of persons who, being really *Brithial Banias*, wished to be described as *Gandha Banias*. It was further alleged that he informed a certain assembly, which had met for the purpose of worship, that the complainant belonged to the caste of *Brithial Banias*.

The petitioner was charged with having defamed the complainant on the 12th day of April, and afterwards by describing him as *Brithial Bania*. The charge, however, did not set forth the particular occasions on which the defamation was said to have been committed. He was convicted under s. 500 of the Penal Code by the Subdivisional Officer of Goalparah on the 31st December 1901 and sentenced to pay a fine.

M. Syed Shamsul Huda for the petitioner.

Babu *Kritanta Kumar Bose* for the opposite party.

STEVENS AND HENDERSON, JJ. The petitioner before us has been convicted under section 500 of the Indian Penal Code of committing defamation in respect of the complainant by describing him and others of his caste as *Brithial Banias*. This rule was granted to show cause why the conviction and sentence should not be set aside on the ground that the acts of the petitioner do not amount to the offence of defamation.

It appears that in the Province of Assam a caste originally known as *Haris* and more euphemistically described as *Brithials*, that is, persons following an occupation, have to a considerable extent risen in the social scale, and that in many cases they now follow occupations of a much higher class than that belonging **[404]** to their original caste. For

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instance, they sometimes exercise the craft of goldsmith. At the recent census, in accordance, as it appears from the evidence, with official orders, a number of persons, amongst whom the present complainant was included, were described by the enumerators in the census papers as *Brithial Banias*, although subsequently on a remonstrance by some of them, also apparently including the complainant, the caste designation was altered to *Gandha Bania*.

The petitioner before us is, it seems, the collecting *panchait* of his village. He is said, as appears from the evidence, to have defamed the complainant by giving a *chaukidari* receipt to him in which he is described by the designation of *Brithial Bania*, and also by sending a letter to the *panchait* of a neighbouring village desiring him to co-operate with him in putting an end to the pretensions of persons who, being really *Brithial Banias*, wished to be described as *Gandha Banias*. He is also said to have informed a certain assembly, which had met for the purpose of worship, that the complainant belonged to the former caste.

There has not been a proper charge in the case. The charge sets out that the defamation was committed on or about the 12th day of April and afterwards by describing the complainant as *Brithial Bania*. The charge does not set forth the particular occasions on which the defamation is said to have been committed, so as to give the accused person, now the petitioner, an opportunity of defending himself with reference to each act alleged to have been committed by him.

The 12th of April is apparently the date of the *chaukidari* receipt. The delivery of such a receipt to the complainant himself was obviously not a publication such as would render the petitioner liable to punishment for defamation. As regards the other two occasions there is no definite finding by the Deputy Magistrate in his judgment. The letter was not written or signed by the petitioner himself; but it was written by a nephew of his who has given evidence in the case. The nephew states that he himself wrote the letter and that he did not write it under the instructions of the petitioner. All that the Deputy Magistrate says on this subject is that there cannot in his mind be any doubt that the denial of the witness that he wrote the letter under the instructions [405] of the accused is prompted only by a desire to save his uncle. In other words, if this can be taken to be a finding against the petitioner, it is a finding not only not upon evidence, but against the evidence in the case.

As regards the statement said to have been made before the religious assembly, there is no distinct finding on the subject.

We think that even if the petitioner did make the statement in question on the occasions on which he is alleged to have made it, to the effect that the complainant and others similarly situated belonged to the caste of *Brithial Banias*, he would not be liable to conviction for defamation, unless it could be shown that he did so otherwise than in good faith. We have already said that these persons were, under official instructions, so described in the census papers, and there is nothing to show that the petitioners had any information of the alteration which is said to have been subsequently made in the caste designation in those papers.

As regards the intention of the petitioner, the Deputy Magistrate states in his judgment as follows: "That the epithet was applied with a malicious motive is proved by the fact that when the complainant and

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his caste-men objected to it, the accused did not apologise to them for his inadvertent use of it towards them. Before this Court also the complainant has not expressed regret for his act."

It seems to us that the subsequent omission of the petitioner to apologise for the use of the caste designation in question cannot be taken as indicating that he used it at the time with a malicious intention.

It is stated by the complainant in evidence (and in his explanation, which has been submitted in showing cause against this Rule, the Deputy Magistrate has referred to the circumstance) that the petitioner endeavoured to obtain from the complainant and from his caste-fellows a payment of Rs. 100 as an inducement to describe them as they desired to be described. There is no finding in the judgment that such an attempt was in fact made by the petitioner; indeed there is no mention of the matter at all. If the Deputy Magistrate believed that that was the case, he should certainly have recorded a definite finding on the subject.

[406] On the whole we think that the conviction of the criminal offence of defamation was not justified, and that if the complainant considers himself aggrieved by the action of the petitioner his proper remedy lies in a suit in the Civil Court.

The Rule is made absolute and the conviction and sentence are set aside. The fine, if realised, or so much thereof as may have been realised, must be refunded. If the amount which was directed to be paid to the complainant by way of compensation has in fact been paid to him, he must refund it.

Rule made absolute.

30 C. 407.

[407] APPELLATE CIVIL.

ASHRAFUDDIN AHMED *v.* BEPIN BEHARI MULLICK.*

[11th December, 1902.]

Insolvency—Civil Procedure Code (Act XIV of 1882) *s.* 307*—Debt not included in the Schedule—Insolvent Debtor, discharge of—Right of creditor, not in the Schedule, against the discharged insolvent's property—Limitation Act (XV of* 1877) *Schedule II, articles* 178-179.

A creditor whose debt has not been included in the scheduled debts within the meaning of s. 357 of the Code of Civil Procedure, is entitled to proceed with the execution of his decree against the insolvent's property, notwithstanding his discharge.

Haro Pria Dabia v. *Shama Charan Sen* (1), and *Sheoraj Singh* v. *Gauri Sahai* (2) referred to.

On an application for execution of a decree having been made by the decree-holder, the salary of the judgment-debtor was attached. The judgment-debtor having represented that, as all his property had vested in a Receiver, he having taken insolvency proceedings, the execution could not be carried on, the Court released from attachment the salary of the judgment-debtor which had been attached. Subsequently the insolvency proceedings came to an end by the discharge of the Receiver. Within three years from the final discharge, the decree-holder made another application asking the Court to revive his former application for execution. The judgment-debtor objected to the execution on the ground that it was barred by limitation:

Held, that the case was governed by article 178, Schedule II of the Limitation Act, and that the present application was one in continuation of the

* Appeals from Orders Nos. 84, 138, 202, 203 and 240 of 1901, against the order of Babu Hemango Chunder Bose, Subordinate Judge of Hooghly, dated the 22nd December 1900.

(1) (1889) I. L. R. 16 Cal. 592. (2) (1899) I. L. R. 21 All. 227.